IN THE HIGH COURT OF UTTARANCHAL
AT NAINITAL

Second Appeal No. 336 of 2001
(Old No. 205 of 1980)

The Life Insurance Corporation of India
Through the P. Divisional Manager,
Divisional Office
Jeevan Prakash
30 Hazratganj, Lucknow ...Appellant/
Defendant

Vs

Smt. Sushila Chaudhary
Widow of Sri Mahandra Pratap Chaudhary
R/o Chaudhary Bhawan
Tehri Pulia, Haldwani
District Nainital ...Respondent/
Plaintiff

Sri M.K. Goyal and Sri Vipul Sharma, learned counsel for the appellant
Sri Manoj Tiwari, learned counsel for the respondent

Hon'ble B.C. Kandpal, J.

This second appeal has been preferred against the judgment and decree dated 28.02.1977 passed by District Judge, Nainital thereby dismissing the Civil Appeal No. 101 of 1976 arising from the judgment and decree dated 22.07.1976 passed by Civil Judge, Nainital in Civil Suit No. 40 of 1975.

2. Brief facts of the case are that the husband (Sri Mahendra Pratap Chaudhary) of Sushila Chaudhari plaintiff/respondent died on 21.02.1973. He was insured with the defendant/appellant for a sum of Rs. 16,000/- under Life Insurance Police No. 27686839. The amount under the aforesaid policy after the death of Shri Mahendra Prtap Chaudhary became payable to the plaintiff on account of her being his nominee. The plaintiff/respondent in the capacity of nominee of late Sri Mahendra Pratap Chaudhary made a claim with the defendant/appellant for the payment of the amount due under the policy in question but the defendant/appellant evade payment on the pretext that late Sri Mahendra Pratap

Chaudhary furnished wrong particulars regarding his health. The defendant/appellant got him medically examined and he was found medically fit. The defendant/appellant thereafter accepted the policy in question. Since the defendant/appellant refused to pay the amount due under the policy so the plaintiff/respondent had to file the suit.

3. The defendant/appellant filed written statement and admitted that Sri Mahendra Pratap Chaudhary died on 22.02.1973 and the plaintiff/respondent is his nominee under the policy in question. Sri Mahendra Pratap Chaudhary was working as a Clerk in the Municipal Board, Haldwani but on 26.02.1969 he gave out his occupation as a landlord and thus mislead the defendant/appellant regarding his financial status. The policy of the plaintiff was accepted on 14.03.1972. There was also a condition precedent to the acceptance that the assured would communicate to the defendant/appellant any change in his general health between the date of proposal and the date of the letter of acceptance or the date of payment of first premium and the aforesaid condition was binding on him. The defendant/appellant further alleged that on 08.03.1969 assured was found suffering from dyscentry with fever and was under the treatment of Dr. R.P. Yadav, Medical Officer, Civil Hospital, Haldwani. Dr. R.P. Yadav diagnosed that the assured late Sri Mahendra Pratap Chaudhary was suffering from Amoevic Hepatitis with fever and he recommended for granting four weeks leave with effect from 28.03.1969. The assured was thus suffering from serious ailment on 14.03.1969 when his policy was accepted. For this reasons the defendant/appellant alleged the that policy in question to be void as by suppressing the aforesaid fact regarding his health the assured played fraud upon the defendant/appellant. The defendant/appellant further alleged

that a mere examination of the assured by his doctor did not prevent him from making enquired regarding the health of assured. The defendant/appellant also alleged that an amount of Rs. 945/- had been advanced to the assured as loan and the said amount plus Rs. 37.40 as interest thereon upto 31.02.1973 were due from the plaintiff to the defendant/appellant. Accordingly, the defendant/appellant claimed the said amount as counter claim.

4. The plaintiff/respondent filed replica denying the defendant/appellant's counter claim. The plaintiff/respondent also alleged that the counter claim is time barred and is not maintainable unless all the heirs of the deceased are impleaded. It was further alleged that the present suit has been filed by the plaintiff as a nominee of Sri Mahendra Pratap Chaudhary and hence the defendant's/appellant's counter claim is not maintainable.

5. After perusing the pleadings of both the parties, following issues were framed by the court concerned:-

1. Whether the deceased Mahendra Pratap Chaudhary furnished incorrect particulars and made incorrect statement in the proposal with the intention to defraud the defendant?
2. Whether the deceased Mahendra Pratap Chaudhary suppressed information pertaining to change in his general health between the time of the proposal and its acceptance or payment of first premium?
3. Whether the policy is void as is alleged by the defendant.

4. Whether the plaintiff is not liable for the demand in respect of the counter claim and whether the counter claim is not maintainable for absence of other L.R.?
5. Whether the counter claim is barred by time?
6. To what relief, if any, is the plaintiff entitled?

6. The trial court after having considered the entire material available on the record decreed the suit filed by the plaintiff/respondent vide judgment and order dated 28.02.1977.

7. Feeling aggrieved by the aforesaid judgment and order passed by the court below, the second appeal was preferred by the defendant/appellant before the Allahabad High Court.

8. At the time of the admitting the appeal, the Court admitted the appeal on the substantial question of law relating to the interpretation of the proviso added to order 17 Rule 1 of C.P.C. by the Allahabad High Court.

9. Heard Sri M.K. Goyal and Sri Vipul Sharma, learned counsel for the appellant, Sri Manoj Tiwari, learned counsel for the respondent and perused the record.

10. The record reveals that when the date for final hearing in the suit was fixed, the defendant/appellant moved an application for adjournment on the ground that he has to produce Dr. R.P. Yadav, the then Medical Officer, Civil Hospital, Haldwani who has been transferred and enquiry regarding the present place of posting is to be made. It has

been mentioned in the application that Dr. R.P. Yadav is a necessary witness. The application was not supported with any affidavit and the trial court found the ground for adjournment to be insufficient. Hence, rejected the same.

11. The proviso appended to Order 17 Rule 1 C.P.C. by the Allahabad High Court which is to the effect that no adjournment shall be granted for the purpose of calling the witness not previously summoned or named nor shall any adjournment be utilized by any party for such purpose unless the Judge has made an order in writing under the proviso to Order 17 Rule 1 C.P.C.

12- The trial court made a categorical observation in the judgment that Dr. R.P. Yadav has not been summoned as a witness and he has also not been named consequently therefore, the application was not maintainable. The trial court has further decreed the suit of the plaintiff/respondent for recovery of Rs. 16,000/- from the defendant/appellant in detail after assessing the evidence available on record. The lower appellate court has also observed that the defendant/appellant admittedly had not named Dr. R.P. Yadav be summoned as a witness previously hence, there was no ground for the adjournment for the purpose of calling Dr. R.P. Yadav as a witness.

13. It is pertinent to mention here that the appellant did not press any other arguments in order to challenge the trial court's finding except that the adjournment of the defendant/appellant was improperly refused by the trial court. Lower appellate court has also recorded a categorical finding that in view of the provision of Order 17 Rule 1 C.P.C. added

by the Allahabad High Court, the adjournment was rightly refused.

14. Since both the courts below have recorded concurrent findings of fact which certainly cannot be interfered with in the second appeal hence, the provision of Order 17 Rule 1 C.P.C. added by the Allahabad High Court has been rightly applied in the present case. I do not find any infirmity and illegality in the impugned judgment and orders passed by both the courts below.

15. Therefore, the appeal lacks merit and is liable to be dismissed.

16. Accordingly, the second appeal is dismissed. No order as to costs.

(B.C. Kandpal, J.)

05.09.2006
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